RECORD AND BRIEFS.

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No. 16-1023

IN THE

Supreme Court of the United States

STATE OF NORTH CAROLINA, *ET AL.*,
Appellants,
v.
SANDRA LITTLE COVINGTON, *ET AL.*,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

MOTION TO AFFIRM

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RESTATEMENT OF QUESTIONS PRESENTED

A unanimous, three-judge district court concluded that the North Carolina General Assembly racially gerrymandered twenty-eight legislative districts in violation of the Equal Protection Clause. Although the timing of the court's opinion did not permit redrawing the districts in time for the 2016 elections, the court enjoined any further use of the districts and expressly retained jurisdiction to enter any order necessary to timely remedy the egregious constitutional violation, including by ordering special elections. After supplemental briefing in which no party suggested that the court lacked jurisdiction to enter a remedial order, the court, in a well-reasoned opinion, unanimously ordered that special elections be held in 2017 pursuant to constitutionally drawn districts.

The questions presented are:

1. Did the district court properly retain jurisdiction to enter a final remedy, having expressly noted it was doing so?

2. Did the district court act within its broad and flexible discretion in fashioning appropriate equitable relief to remedy the State's egregious racial gerrymandering?

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INTRODUCTION

It is unremarkable, black-letter law that district courts enjoy broad discretion in fashioning equitable remedies for constitutional violations, and that this discretion is at its apex in cases involving the public interest. This is just such a case. In 2011, the North Carolina General Assembly enacted state legislative districts using explicit racial quotas. The end result was a series of Rorschach-like districts based predominantly on race and not on any traditional redistricting criteria. Although Appellants (the "State") claimed that the mechanical use of racial targets was necessary to avoid liability under the Voting Rights Act ("VRA"), the three-judge district court easily found that the State lacked a strong basis in evidence to believe such actions were in fact necessary. Applying this Court's well-established precedents, the court unanimously concluded that twenty-eight of the State's districts were unconstitutional racial gerrymanders.

At the time the district court ruled the challenged districts unconstitutional, the maps had already imposed harms on North Carolina voters for two election cycles. However, because the machinery for the decade's third election cycle was already in motion at the time of the court's opinion, the court "regrettably conclude[d]" that it was unable to order new districts in time for the November 2016 elections. J.S. App. 143. Thus, it enjoined the use of the maps only for elections held after November 2016. The court emphasized, however, that the voters were entitled to swift injunctive relief, and, accordingly, stated that it was retaining jurisdiction to enter any orders necessary to

timely remedy the constitutional violation. The court then ordered the parties to brief whether additional relief should be provided prior to the 2018 elections. Following this briefing, the court weighed the equities and unanimously determined that special elections should be held in 2017 to remedy the constitutional violations.

The State's argument that the court lacked jurisdiction to order special elections is unsupported by either the facts or the law. Equally meritless is the State's argument that the district court wildly abused its discretion and acted without precedent in ordering special elections. The court had extensive evidence before it about the nature of the harms to North Carolina voters, as well as the administration of state elections. Its decision to order special elections was well-considered and in no way unprecedented. Importantly, the question presented by this appeal is not what remedy this Court would have chosen, but whether the district court abused its discretion in ordering a prompt cure for the extensive and blatant constitutional violations. It did not, and the remedial order should therefore be summarily affirmed.

The timing of the Court's consideration of this appeal is critical. While Appellees believe the decision below should be summarily affirmed, should the Court decline to take that path, Appellees respectfully request that the Court note probable jurisdiction and order expedited briefing and argument so that the appeal can be decided by the end of this Term. If the Court does not summarily affirm or proceed on an expedited basis, the State will be able to moot the relief

Appellees obtained simply by running out the clock with this appeal.

STATEMENT OF FACTS

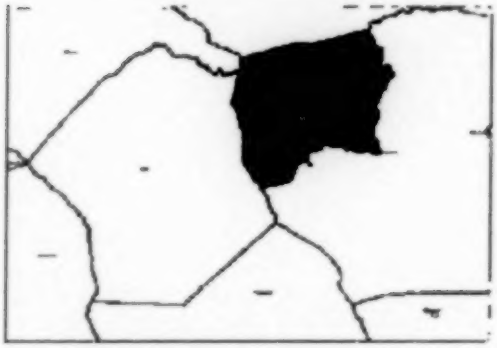
A. The Redistricting Process

At the time of the 2011 redistricting in North Carolina, twenty-five years had passed since this Court decided *Thornburg v. Gingles*, 478 U.S. 30 (1986), which found that North Carolina had violated Section 2 of the VRA. During the intervening decades, there had been no Section 2 challenges to state legislative districts, and no liability for vote dilution established in any redistricting case. The number of majority-black legislative districts in the state was decreasing, while the number of African-American legislators in the General Assembly was increasing. J.S. App. 6-7; Dkt. 109 at 47-48. In fact, data readily available at the time of redistricting, J.S. App. 7, showed that in the three election cycles immediately preceding the 2011 redistricting, "African-American candidates for the North Carolina House won thirty-nine general elections in districts without a majority BVAP [black voting age population] (including eleven such elections in 2010 alone), and African-American candidates for the North Carolina Senate won twenty-four such elections (including seven such elections in 2010)." J.S. App. 7.

Despite the fact that the data clearly showed there was no need to create majority-minority districts to elect minority candidates of choice, the North Carolina legislature's Redistricting Chairs, Senator Robert Rucho and Representative David Lewis, instructed their consultant, Dr. Thomas Hofeller, to do just that. At the outset of the process, Dr. Hofeller was

instructed to draw a racially proportionate number of majority black voting age population ("BVAP") districts for the state house and senate, each at greater than 50% BVAP, and to prioritize drawing the racially designed districts before drawing any others. J.S. App. 9-10, 22. As a result, the number of majority-black state house districts rose from nine to twenty-three, while the number of majority-black state senate districts rose from zero to nine. J.S. App. 6-7, 28. This was accomplished by creating bizarrely shaped districts with finger-like borders that reach out to capture black residents, while avoiding white residents. Shown below are two such examples, Senate Districts 21 and 14:

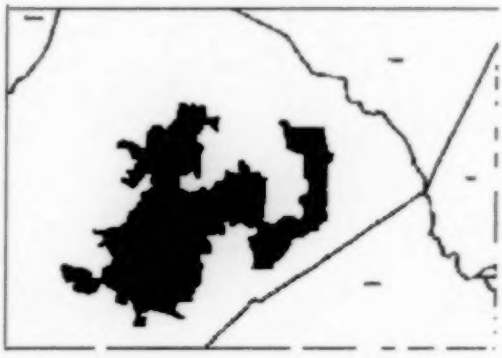
Benchmark SD 21



Enacted SD 21

Benchmark SD 14

Enacted SD 14



Dr. Hofeller began the task of redistricting by preparing a racial proportionality chart to determine

how many majority-black districts would be needed to satisfy the Redistricting Chairs' racial targets. J.S. App. 31-32. By his own admission, he then proceeded to draw majority-black districts "without reference to any communities of interest or geographic subdivisions, such as county lines and precinct lines." J.S. App. 32. Dr. Hofeller set out to meet these racial targets without reference to any racially polarized voting study—the type needed to demonstrate risk of liability under Section 2 of the VRA. Dkt. 119 at 80-82.[1]

In creating these districts, Dr. Hofeller split counties, cities, towns, and precincts along racial lines, placing black voters in the challenged districts and avoiding white voters so as to include them in adjoining districts. J.S. App. 34-35, 37-38. As illustrated above, the resulting districts are oddly shaped and non-compact, whether measured visually or quantitatively. J.S. App. 39-40. Racial density maps for each challenged district reveal the purpose of the bizarre lines: to exclude largely white communities and include largely black communities in order to attain Senator Rucho and Representative Lewis's racial targets. J.S. App. 47-48, 49-113.

During the legislative debates about the maps, several African-American legislators questioned why

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[1] The State incorrectly claims that the Redistricting Chairs "began the 2011 redistricting process by collecting evidence about the extent of racially polarized voting." J.S. 4. In fact, by his own admission, Dr. Hofeller drew the challenged districts without reference to any information about the extent of racially polarized voting. Dkt. 119 at 80-82.

increasing the BVAP in the challenged districts to 50% or greater was necessary to allow African-American voters an equal opportunity to elect their candidates of choice, given that in recent history there had been "no problem" electing African-American voters' candidates of choice in districts that were not majority-minority districts. J.S. App. 131-32. For example, in the two districts pictured above, the black candidates' margin of victory in SD 14 in the five elections between 2002 and 2010 was never less than 64-36 and in SD 21 was never less than 61-39, even though the BVAP in both was 41%. Dkt. 90 at 7-9, 14, 16. No African-American legislator voted for the plans adopted by the legislature. Dkt. 109 at 71, 79-80.

B. The Litigation

Shortly after this Court decided *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) ("*ALBC*"), clarifying that the use of mechanical racial targets is impermissible in districting, Appellees filed suit to challenge North Carolina's use of mechanical racial targets to create twenty-eight house and senate districts. The three-judge district court held a five-day bench trial in April 2016. On August 11, 2016, the court issued a unanimous opinion concluding that race predominated in the drawing of the twenty-eight challenged districts and that the State had failed to demonstrate that its use of race was narrowly tailored to further a compelling governmental interest. J.S. App. 2.

The district court found that the evidence unambiguously showed that race predominated above all considerations, including race-neutral districting criteria such as recognizing political subdivisions and

communities of interest, geographic compactness, and the state constitution's Whole County provision. J.S. App. 14-44, 49-113. All of these criteria were sacrificed to attain a racially proportional number of districts with at least 50%-plus-one BVAP. *Id.* Moreover, the court concluded that partisan goals were not the motivating factor in packing black voters into these districts; "[i]ndeed, the evidence suggest[ed] the opposite." J.S. App. 42. In reaching its overall conclusion, the district court conducted a careful district-by-district analysis, concluding that race predominated in drawing each of the challenged districts. J.S. App. 48-113.

The district court further concluded that the State's racial gerrymandering could not survive strict scrutiny. Assuming that a state's compliance with Sections 2 and 5 of the VRA is a compelling governmental interest, J.S. App. 114, the district court nonetheless found that the State lacked a strong basis in evidence to believe its actions were necessary. With respect to Section 2, the evidence showed that the State had not even conducted the complete *Gingles* analysis necessary to identify Section 2's applicability. J.S. App. 116-135. The evidence also showed that increasing the BVAP in the challenged districts was not necessary to provide African-American voters an equal opportunity to elect the candidates of their choice. J.S. App. 130-132.

With respect to Section 5, eleven of the twenty-eight districts were not even covered jurisdictions. J.S. App. 136. And by applying the mechanical racial targets, the legislature "failed to ask the right question," *i.e.*, whether increasing BVAP was

necessary to avoid "retrogression" in minorities' ability to elect their candidates of choice. J.S. App. 137. Indeed, in some instances the legislature's application of a 50%-or-more BVAP target increased the BVAP by more than 20%—a result clearly uncalled for by Section 5's non-retrogression principle. J.S. App. 138-139.

With liability settled, the court turned to consider remedies. Appellees requested that new maps be put in place in time for the November 2016 elections. But, balancing the equities, the court concluded there was insufficient time for the State to implement new districts prior to those elections. J.S. App. 142-144. Accordingly, it declined Appellees' request. It did, however, note that Appellees were "entitled to swift injunctive relief." J.S. App. 144. Thus, in addition to ordering that the state redraw constitutional maps and that no further elections be held pursuant to the unconstitutional maps, the court stated that it was "retain[ing] jurisdiction to enter such orders as may be necessary . . . to timely remedy the constitutional violation." J.S. App. 149. The court then requested supplemental briefs "about the appropriate deadline for the North Carolina legislature to draw new districts, the question of whether additional relief would be appropriate before the regularly scheduled elections in 2018, and, if so, the nature and form of that relief." Dkt. 124.

In the briefing that followed, Appellees requested that the court set a deadline of January 25, 2017 for the State to draw new districts and that special elections be held in 2017. Dkt. 132. The State countered that special elections were expensive, burdensome, and not warranted. *Id.*; Dkt. 136 at 1-2. The State argued in the

alternative that if the court considered special elections appropriate, the legislature should have until May 1, 2017 to enact new districts. *Id.* at 2. In all of the briefing and argument on these issues in the district court, the State never suggested that the court was without jurisdiction to enter further remedial orders, including an order of special elections.

On November 29, 2016, the district court issued a remedial order setting a deadline of March 15, 2017 for the legislature to draw new districts and requiring the State to conduct special elections in the fall of 2017. J.S. App. 198-204. In doing so, the district court carefully weighed the equities, concluding that the costs involved in conducting special elections "pale in comparison to the injury caused by allowing citizens to continue to be represented by legislators elected pursuant to a racial gerrymander." J.S. App. 199-200.

The district court denied the State's subsequent motion for a stay, Dkt. 147, but this Court granted the stay pending resolution of this appeal. *North Carolina v. Covington*, No. 16A646, 2017 WL 81538 (U.S. Jan. 10, 2017).

REASONS FOR GRANTING THE MOTION

The State's appeal of the district court's remedial order raises insubstantial issues and the order should be summarily affirmed, for a number of reasons.

First, the State's jurisdictional objection is meritless. The district court, in its initial liability order from which the State filed its first appeal with this Court, expressly retained jurisdiction to fashion a timely remedy for the constitutional violation. The issue of final remedies was plainly not encompassed by

the State's initial appeal, and the district court had jurisdiction to remedy the constitutional wrong it had found—a fact demonstrated by the parties' litigation conduct below.

Second, the court's choice of remedy—special elections in constitutionally designed districts—was well within the court's broad and flexible equitable authority to remedy constitutional violations. The scope of the State's racial gerrymander and its duration outpaces that of most such cases, as does the blatancy with which it was conducted. The remedy of special elections was clearly proportional to the violation. Moreover, the district court's remedial order was accompanied by a careful and well-reasoned balancing of the equities, and was consonant with previous cases in which special elections have been ordered.

Third, the State's federalism objections are misplaced. North Carolina has no federalism interest in placing black residents into gerrymandered districts on account of their race. The State's undoubted authority to regulate its elections is subject to the Supremacy Clause. Having violated the Equal Protection Clause, the State cannot use ancillary state law, such as term lengths and candidate residency duration requirements, to evade an equitable remedy that the district court deemed necessary to cure the constitutional harms. Nor was the district court's remedial power constrained by the North Carolina Supreme Court's ruling in *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015), *petition for cert. filed*, 85 U.S.L.W. 3026 (U.S. July 5, 2016) (No. 16-24), or by the cost or administrative inconveniences of holding special elections.

Finally, Appellees respectfully request this Court's prompt disposition of this case. Given the timing of the special elections, if this case is not resolved this Term and if the previously entered stay is not lifted, the State will prevail simply by running out the clock.

I. The District Court Had Jurisdiction to Enter the Remedial Order.

The district court had jurisdiction to enter its November 29, 2016 remedial order requiring the State to hold special elections in 2017. The State's argument to the contrary rests on a misstatement of the proceedings below and a misapplication of the relevant law.

The State claims that "[t]he district court lacked jurisdiction to issue its remedial order because the State's previously filed notice of appeal divested it of power over the case." J.S. 12. Not so. "The filing of a notice of appeal . . . divests the district court of its control over *those aspects of the case involved in the appeal.*" *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (emphasis added). A notice of appeal does not divest a district court of jurisdiction over aspects of the case not involved in the appeal, and the district court retains the power to decide those issues. *See, e.g., Shevlin v. Schewe*, 809 F.2d 447, 450-51 (7th Cir. 1987) (appeal of preliminary injunction order does not divest district court of jurisdiction to proceed with the merits of a case).

In redistricting cases in particular, remedial issues *always* remain after the district court initially finds the challenged districts legally infirm and enjoins their

further use. *See, e.g.*, Order, *ALBC v. Alabama*, No. 12-cv-691 (M.D. Ala. Jan. 20, 2017) (noting that "[b]y separate order . . . , the court ha[d] declared that twelve of Alabama's legislative districts are unconstitutional and ha[d] enjoined their use in future elections," and ordering the parties to propose procedures for the "remedy phase" of the litigation).

In a case just last Term, this Court declined to accept the exact same jurisdictional argument the State makes here. In *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016), the district court found Virginia's Third Congressional District was racially gerrymandered and enjoined further use of the map. While the appeal of that injunction was pending before this Court, the district court ordered a remedial plan into effect. *Id.* at 1735. Several members of Congress sought a stay, contending that the district court lacked jurisdiction to order a remedial plan because this Court already "had accepted plenary review of the liability judgment and the injunction enjoining use of the Enacted Plan." Application for a Stay at 37, *Wittman v. Personhuballah*, No. 15A-724 (U.S. Jan. 12, 2016). This Court denied the stay request, thereby affirming the district court's continuing jurisdiction to impose the remedial map. *See* 136 S. Ct. at 1735.

The district court in this case proceeded in similar fashion, finding liability and retaining continued jurisdiction over the remedy. In the district court's August 11, 2016 opinion, the court found that the State was liable for racially gerrymandering twenty-eight districts in violation of the Equal Protection Clause, but made clear that final resolution of remedial issues was forthcoming after an additional round of briefing by the

parties. The court specifically noted that it was considering "whether additional or other relief would be appropriate *before* the regularly scheduled elections in 2018, and, if so, the nature and schedule of that relief." J.S. App. 144-145 (emphasis added). The court stated that it would require briefing from the parties on these remedial issues by separate order. *Id.*

Accordingly, the district court issued two orders on August 15, 2016. In the first, the district court directed the parties to "meet and confer about the appropriate deadline for the North Carolina legislature to draw new districts, the question of whether additional relief would be appropriate before the regularly scheduled elections in 2018, and, if so, the nature and form of that relief." Dkt. 124. In the second order, the court denied Appellees' request to enjoin the use of the unconstitutional districts in the November 2016 elections, but granted their request insofar as the State was enjoined from using the districts for any election after November 2016. J.S. App. 148. That order expressly announced that the court's remedial work was not yet complete and that the court was "retain[ing] jurisdiction to enter such orders as may be necessary . . . to timely remedy the constitutional violation." J.S. App. 149.

The State's subsequent notice of appeal from the August 15 liability order had no effect on the district court's jurisdiction to order additional relief on November 29. The district court made clear that it had not finally resolved the issue of remedies and that it was retaining jurisdiction to do so. The question of the final remedy for the State's constitutional violation was, therefore, not resolved by the August 15 order

and not an "aspect[] of the case involved in [the State's September 13] appeal." *Griggs*, 459 U.S. at 58. Moreover, because the district court's adjudication of remedial issues did not in any way threaten to interfere with this Court's review of the questions presented in the State's first appeal, namely, whether the challenged districts were unconstitutional, the district court properly retained jurisdiction to enter further remedial orders.

The State clearly understood as much. Following the August 15 order, the State vigorously litigated the matter of remedies in the district court. In a filing submitted on September 9, 2016, the State "request[ed] that members elected in November 2016 be allowed to serve their full two year term and that no special election for legislative offices be ordered for November 2017 or any other date." Dkt. 128. The State then submitted a 17-page brief on October 28, 2016, arguing that the district court should not order special elections, but if special elections were ordered, the district court should afford the legislature more time to draw districts. Dkt. 136. Not once in any of its briefing did the State suggest that the district court had completely resolved the issue of remedies in its August 15 order or that the district court lacked jurisdiction to issue further relief on account of the State's September 13 notice of appeal to this Court. The State's litigation conduct below clearly belies its newfound jurisdictional arguments in this Court.

Moreover, in making its jurisdictional arguments, the State relies on plainly inapposite cases. These cases involve clear examples of district courts interfering with the appellate courts' jurisdiction by,

for example, reversing course on the precise issue before the appellate court, *see, e.g.*, *Donovan v. Richland Cty. Ass'n for Retarded Citizens*, 454 U.S. 389, 390 n.2 (1982); *Zimmer v. McKeithen*, 467 F.2d 1381, 1382 (5th Cir. 1972), *judgment aff'd sub. nom. E. Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976), or by altering a plainly final decision that was then before the appellate court, *see City of Cookeville v. Upper Cumberland Elec. Membership Corp.*, 484 F.3d 380, 394-95 (6th Cir. 2007); *McClatchy Newspapers v. Cent. Valley Typographical Union*, 686 F.2d 731, 734-35 (9th Cir. 1982).

Those cases have no relevance here. The August 15 order from which the State appealed did not finally resolve the rights of the parties in this case—a fact the court made expressly clear. The State's first appeal thus expressly did *not* encompass the final resolution of remedies, and the district court did not interfere with this Court's consideration of that first appeal by doing exactly what it told everyone it was retaining jurisdiction to do—"to enter such orders as may be necessary . . . to timely remedy the constitutional violation." J.S. App. 149.

Equally meritless is the State's reliance on the district court's statement in its August 15 order that "[t]his judgment is final." J.S. App. 149. As this Court has explained, labels do not determine jurisdiction. *See Sullivan v. Finkelstein*, 496 U.S. 617, 628 n.7 (1990). Moreover, the State apparently misunderstands the basis for jurisdiction in this Court over a direct appeal from a three-judge court, which has nothing at all to do with whether there is a final judgment. *See* 28 U.S.C.

§ 1253. That the district court said it was entering a "final judgment" is of no relevance here.

II. The District Court Properly Exercised Its Substantial Discretion in Ordering Special Elections.

The district court acted well within its discretion in ordering the State to hold special elections in constitutionally compliant districts. As a general matter, district courts have wide authority to craft equitable remedies. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *see also United States v. Paradise*, 480 U.S. 149, 184 (1987) (noting it is within the district court's "sound discretion" to craft remedies for racial discrimination). Indeed, a district court has "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

Flexibility is key to the district court's equitable power. "The essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action. Equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision." *Freeman v. Pitts*, 503 U.S. 467, 487 (1992). Consistent with that principle, this Court has not "required remedial plans to be limited to the least restrictive

means of implementation"; rather, the Court has "recognized that the choice of remedies to redress racial discrimination is a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court." *Fullilove v. Klutznick*, 448 U.S. 448, 508 (1980) (Powell, J., concurring) (internal quotation marks omitted). Moreover, this Court has emphasized that "[w]hen federal law is at issue and the public interest is involved, a federal court's equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Kansas v. Nebraska*, 135 S. Ct. 1042, 1053 (2015) (internal quotation marks omitted).

In choosing an equitable remedy for a constitutional violation, the guiding consideration for the district court is the character of the violation. "'[T]he nature of the violation determines the scope of the remedy.' A remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation." *Freeman*, 503 U.S. at 489 (quoting *Swann*, 402 U.S. at 16). Moreover, a district court's remedial orders are reviewed only for abuse of the court's broad and flexible discretion. *See Milliken v. Bradley*, 433 U.S. 267, 288 (1977).

The State does not dispute that, as a general matter, racially gerrymandered districts must be redrawn without using race as the predominant factor to include or exclude voters from particular districts. *See* J.S. 12; *Shaw v. Hunt*, 517 U.S. 899, 907-08 (1996). Rather, the State contends that the district court's discretion was severely constrained such that it had no choice or flexibility whatsoever—that the court's only

option was to order that new maps be used in the next regularly scheduled general election in 2018. The State's position effectively eliminates the entire concept of remedial discretion for district courts.

A. The District Court Properly Weighed the Equities in Choosing to Order Special Elections.

In exercising its discretion to order special elections, the district court carefully and properly weighed the equities. The State's assertion that the court engaged in no analysis in this regard is plainly belied by the record.

In its August 11 opinion, the court first considered and rejected Appellees' request for immediate injunctive relief to prohibit the use of the challenged districts in the 2016 elections. The court explained that the election date was simply too imminent. J.S. App. 144. The court noted, however, that "[Appellees], and thousands of other North Carolina citizens, have suffered severe constitutional harms stemming from the creation of twenty-eight districts racially gerrymandered in violation of the Equal Protection Clause" and that they are "entitled to swift injunctive relief." J.S. App. 144. The court, accordingly, entertained additional rounds of briefing about the proper remedy and found that special elections were appropriate. In so ruling, the court again weighed the equities on both sides, stating:

> While special elections have costs, those costs pale in comparison to the injury caused by allowing citizens to continue to be represented by legislators elected pursuant to a racial

> gerrymander. The Court recognizes that special elections typically do not have the same level of voter turnout as regularly scheduled elections, but it appears that a special election here could be held at the same time as many municipal elections, which should increase turnout and reduce costs.

J.S. App. 200. "[S]ensitive," however, "to the defendants' concern that the large number of districts found to be racial gerrymanders w[ould] render the redistricting process somewhat more time-consuming," the court declined to adopt Appellees' proposed timeline for any legislative redistricting process. J.S. App. 201. The court instead provided the legislature an opportunity to draw new districts by March 15, 2017—"seven months from the time the districts were held to be unconstitutional" and six weeks from the time the new legislature was scheduled to convene in January 2017. J.S. App. 201.[2]

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[2] The district court discussed the equities involved in fashioning an appropriate remedy for a third time, when it denied the State's motion to stay the court's November 29 order. *See* Dkt. 147. In doing so, it rejected the State's various arguments opposing special elections, including the State's argument that special elections were inappropriate because of the number of districts involved. The court explained that this argument "amount[ed] to little more than a claim that [the State's] racial gerrymandering is 'too big to remedy,'" and it found that "the large number of racially gerrymandered districts weighs in favor of—rather than against—awarding relief as quickly as possible." *Id.* at 4-5. The court correctly concluded that absent special elections,

These decisions, which followed extensive briefing on the matter of remedies, demonstrate the care and seriousness with which the three-judge court undertook its obligation to fashion an appropriate remedy. They also make clear that the State's suggestion that the court ordered special elections "without *any* discussion of the competing equities," J.S. i, is simply wrong. The district court sat through a full trial, issued a 167-page opinion, and analyzed supplemental briefing on the issue of remedies. Despite the State's numerous protestations that the court acted improperly because it failed to consider the equities on both sides, it is obvious that the State is simply unhappy with *how* the court evaluated and weighed the equitable considerations in this case.

Most strikingly, in criticizing the district court's balancing, the State utterly ignores the district court's recognition of the serious constitutional harms suffered by Appellees and other North Carolina voters. *See* J.S. 22-30; *see also* Dkt. 147 at 7-9 (noting the State "fail[ed] to acknowledge the considerable irreparable harm that staying the November 29 Order would impose on Plaintiffs and the public at large"). The State does not even mention the district court's conclusion that the unconstitutional districts had imposed, and are continuing to impose, "severe constitutional harms,"

"a large swath of North Carolina citizens will lack a constitutionally adequate voice in the State's legislature, even as that unconstitutionally constituted legislature continues to pass laws that materially affect those citizens' lives." *Id.* at 5.

including "substantial stigmatic and representational injuries," not just on Appellees but on "thousands of other North Carolina citizens." J.S. App. 142, 144.

The district court's assessment of the extensive harms caused by Appellants' racial gerrymandering was, however, no doubt correct. As this Court has repeatedly recognized, racially gerrymandered districts cause serious harms. Such districts "reinforce[] the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw v. Reno*, 509 U.S. 630, 647 (1993). Moreover, "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole"—a result that is "altogether antithetical to our system of representative democracy." *Id.* at 648; *see also id.* at 658. Given these and other harms, it is virtually beyond dispute that racial gerrymandering "strikes at the heart of our democratic process, undermining the electorate's confidence in its government as representative of a cohesive body politic in which all citizens are equal before the law." *ALBC*, 135 S. Ct. at 1275 (Scalia, J., dissenting); *see also id.* at 1265 (majority opinion). The district court certainly did not abuse its discretion in determining that the magnitude of these harms weighed in favor of Appellees' requested relief.

Contrary to the State's arguments, the district court likewise properly considered the duration of the violation in this case. Because of the imminence of the 2016 elections, the court permitted the unconstitutional

districts to remain in place despite this Court's admonition that once legislative districts are found unconstitutional, "it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds v. Simms*, 377 U.S. 533, 585 (1964). If no special election were held in 2017, the harms stemming from the racially gerrymandered districts would be allowed to continue—unabated—for more than two years following a court ruling that the districts are unconstitutional, over three years after Appellees filed this suit and first sought injunctive relief, and for the better half of a decade. Under such circumstances, it was well within the district court's discretion to find that relief should not be delayed any longer.

This is particularly so given the blatancy of the racial gerrymander in this case. The predominance of race-based considerations in this case is far more egregious than the racial gerrymander this Court invalidated in *ALBC*. In that case, "[t]he legislators in charge of creating the redistricting plan believed, and told their technical advisor, that a primary redistricting goal was to *maintain* existing racial percentages in each majority-minority district, insofar as feasible." 135 S. Ct. at 1271 (emphasis added). In this case, the legislators in charge of creating the redistricting plans told their technical advisor to prioritize two race-based considerations above all else. Doing so resulted in the number of majority-black state house districts dramatically increasing from nine to twenty-three and the number of majority-black state senate districts increasing from zero to nine. J.S. App. 6-7, 28.

The harms caused by this race-based scheme were uncommonly far-reaching in scope. Yet, astonishingly, the State contends that the scope of the violation, including the need to modify the boundaries of an estimated 116 districts, counsels *against* a swift remedy in this case. J.S. 28. The fact that 116 members of the current legislature come from districts made possible by the State's unconstitutional, race-based districting scheme counsels *in favor of* a swift remedy, not against it.

Finally, the State raises two additional objections—that the three-judge court was motivated by partisan politics in ordering special elections, J.S. 28-29, and that the court concealed the potential for special elections from the voters who went to the polls in 2016, J.S. 28. Such speculation about the motivations of the three-judge court is completely inappropriate.

First, the State's suggestion that the district court's remedial order was a partisan response to the outcome of the 2016 elections is way off base. The unanimous court was composed of judges appointed by presidents of both parties. The only reason to think the decision was motivated by politics is because the State is accusing the three-judge court of being motivated by politics. The State cannot *create* that false concern and then use that false concern—"the possibility of voters drawing that conclusion," J.S. 29—as a justification to deny relief.

Second, contrary to the State's suggestion, voters went to the polls in November 2016 well aware that the court might order special elections. The court's August 11 opinion explained that it would seek additional briefing on "whether additional or other relief would be

appropriate *before the regularly scheduled elections in 2018*," J.S. App. 144-145 (emphasis added); *see also* Dkt. 124. The parties' remedial briefs—which were filed before the November 2016 election—expressly discussed the possibility of special elections in 2017. Dkt. 128, 129, 132, 133, 136. And the media covered all of this prior to the 2016 elections.[3] The State's contention that it and voters were caught unaware of the possibility of special elections blinks reality.

B. The State's Proposed Test for Ordering Special Elections is Misguided, and It Is Satisfied Here Anyway.

While (wrongly) claiming the district court neglected to balance the equities, the State also makes up out of whole cloth a "test" that it claims district courts must apply before ordering special elections. Under the State's proposal, special elections should be ordered only if: 1) the legislature acted in bad faith or committed an egregious violation, 2) the violation had a significant impact on the election results, and 3) the benefits of holding a special election outweigh the state's interest in governing once the regularly

[3] *See, e.g.*, Anne Blythe, *NC Lawyers Ask Judges to Consider Special Elections in 2017 for NC House and Senate Races*, News and Observer (Sept. 9, 2016), http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article100978762.html; Lynn Bonner, *Federal Judges Find NC Legislative District Unconstitutional*, News and Observer (Aug. 11, 2016), http://www.charlotteobserver.com/news/politics-government/article95087442.html.

scheduled election is complete. J.S. 19-22. This Court has never applied the State's newly fashioned three-part "test" to determine whether special elections are appropriate.

And for good reason. Federal courts' equitable powers are broad and flexible so that they can meet the unique circumstances of a given case. Constraining courts' remedial authority in redistricting cases according to the factors in the State's made-up test risks inhibiting courts' ability to determine the most appropriate remedy for constitutional harms that undermine democratic institutions. The State's proposed factors are derived from cases whose considerations are wholly distinct from racial gerrymandering cases. Their inapplicability is obvious, not least of all because the first two proposed factors are actually in conflict with each other in redistricting cases. Under the State's proposed test, a gerrymander must be egregious *and* result in close elections. But as the egregiousness of a racial gerrymander increases, so too does the winning candidate's margin of victory. Thus, the fact that candidates in 20 of the 28 districts here ran unopposed underscores, rather than undercuts, the need for special elections in this case. States should not be able to insulate themselves from court-ordered special elections by ratcheting *up* the scope of their constitutional violation in order to ensure that elections are never close.

Moreover, the State's test makes no sense in the redistricting context because in racial gerrymandering cases the injury is the same regardless of the margin of victory. The cases upon which the State relies all involve allegations about the ability of candidates to

run or effectively campaign. *See* J.S. 20-21, 24-25. In that context, it makes sense to consider whether the violation actually affected the outcome. But in racial gerrymandering cases the violation "subject[s] [voters] to [a] racial classification," *ALBC*, 135 S. Ct. at 1265 (quotation marks omitted), and causes them to be "represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group," *id.* (internal quotation marks omitted). These injuries occur regardless of the election outcome.

Thus, although the factors proposed by the State might be relevant in other contexts, they are not relevant here. However, even if the Court adopted the State's proposed test, special elections would still be warranted in this case. First, the racial gerrymander was egregious, as discussed above. *See supra* Part II.A. Second, the gerrymander had a substantial effect on election outcomes—it was so successful that it effectively guaranteed, by non-opposition, the results of the elections in 20 of the 28 unconstitutional districts. Third, the district court properly weighed the considerations and concluded special elections were necessary. *See id.*

C. Special Elections Have Been Ordered in Similar Circumstances.

The district court's conclusion that special elections are an appropriate remedy here finds ample support in prior voting-rights cases. Contrary to the State's suggestion that special elections are virtually unprecedented, "[f]ederal courts have often ordered special elections to remedy violations of voting rights," *Ketchum v. City Council*, 630 F. Supp. 551, 565 (N.D.

Ill. 1985), and have done so in circumstances similar to those presented here.

In *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996), for instance, a district court ruled that nine electoral districts in South Carolina were unconstitutional racial gerrymanders. *Id.* at 1210-11. On the matter of remedies, the court declined the plaintiffs' request that it enjoin the use of the unconstitutional districts in an upcoming election because the state's "election machinery" was already in motion. *Id.* at 1211-12. The court went on to note, however, that the "individuals in the infirm districts . . . ha[d] suffered significant harm" and were "entitled to have their rights vindicated as soon as possible so that they c[ould] vote for their representatives under a constitutional apportionment plan." *Id.* at 1212. Accordingly, the court ordered that legislators elected in districts that needed to be redrawn would serve shortened, one-year terms and special elections would be held in 1997 to select legislators to serve the remainder of the terms. *Id.* Notably, the court concluded that such relief was appropriate without "question[ing] the good faith of the legislature." *Id.* at 1208.

Smith is not an anomaly. Many other districting cases have resulted in court-ordered special elections. *See, e.g., Cousins v. City Council*, 503 F.2d 912, 914 (7th Cir. 1974) (noting that the district court, after finding racial gerrymandering, ordered special elections in modified wards); *Keller v. Gilliam*, 454 F.2d 55, 57-58 (5th Cir. 1972) (ordering special elections be held in one-person, one-vote case); *Tucker v. Burford*, 603 F. Supp. 276, 279-80 (N.D. Miss. 1985) (ordering special

elections be held in one-person, one-vote case because members of the county were "represented by unconstitutionally elected officials"); *Cosner v. Dalton*, 522 F. Supp. 350, 364 (E.D. Va. 1981) (three-judge court) (holding that "[b]ecause Virginia's citizens [we]re entitled to vote as soon as possible for their representatives under a constitutional apportionment plan," the court would limit elected representatives' terms and order election officials to conduct new elections the following year).

The State claims that no court has ever ordered special elections in a case where this Court found a *Shaw* violation. J.S. 11-12. Although the relevance of this assertion is unclear, it is also untrue. In *Bush v. Vera*, 517 U.S. 952 (1996), this Court affirmed a three-judge court's ruling that three Texas congressional districts were unconstitutional racial gerrymanders. On remand, the district court ordered the state to hold special elections in November and December 1996 for districts impacted by an interim plan. *See Vera v. Bush*, 933 F. Supp. 1341, 1342, 1352-53 (S.D. Tex. 1996). Specifically, it ordered that the state was required to hold special open primaries for impacted districts in conjunction with the November 1996 general presidential elections and, if necessary, hold special run-off elections in December 1996. *Id.* at 1352-53. In doing so, the court rejected the claims of some litigants that special elections would, among other things, involve administrative complications, cause voter confusion, and "effectively 'disenfranchise' the voters of the choices they made in the primary elections" held the previous March. *Id.* at 1347-52.

Special elections are an important tool in federal courts' arsenal when dealing with voting-rights violations—including racial gerrymanders. Redistricting plans are never in place for more than five cycles. Depriving federal courts of a special-election remedy could mean voters will be subjected to serious constitutional injuries for at least half a decade. Indeed, consider this case. Appellees filed suit in May 2015. Despite their request to proceed expeditiously to trial in December 2015, *see* Dkt. 20, the case went to trial in April 2016 and the court issued its liability decision in August 2016. By then, it was deemed too late to remedy the constitutional defects prior to the November 2016 elections. As the State would have it, this means Appellees must await relief until the 2018 elections and the swearing-in of new legislators in 2019.

If the word "discretion" is to have any meaning whatsoever, special elections must be a permissible remedy in cases such as this.

III. The District Court's Remedial Order Requiring Special Elections is Consonant with Federalism Principles.

Despite the State's protests to the contrary, the district court's decision to remedy the blatant constitutional violation in this case by ordering special elections is entirely consonant with federalism principles.

A. The Need to Remedy the State's Constitutional Violation Far Outweighs the Importance of Adhering to State Law Regarding Term Length and Candidate Residency Duration.

The State contends that the district court's remedial order upends principles of federalism because special elections will necessarily conflict with provisions of the North Carolina constitution establishing two-year terms for legislators and requiring legislative candidates to reside in their districts for at least a year prior to an election. *See* J.S. 29; N.C. Const. art. II §§ 6-8. The State has it backwards. Federalism does not, as the State seems to contend, mean that adherence to the federal Constitution must be delayed to accommodate ancillary provisions of state law, such as the term length and residency requirements at issue here. Rather, "as every schoolchild learns . . . under our federal system, the States possess sovereignty concurrent with that of the Federal Government, *subject only to the limitations imposed by the Supremacy Clause.*" *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (emphasis added) (internal quotation marks omitted).

Where a state law—even a facially valid state law—interferes with a federal court's remedy for a constitutional violation, the state law has no effect. *See N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) ("[S]tate policy must give way when it operates to hinder vindication of federal constitutional guarantees."); *Stone v. City & Cnty. of San Francisco*, 968 F.2d 850, 862 (9th Cir. 1992) ("[T]he Supreme Court has stated that otherwise valid state laws or court

orders cannot stand in the way of a federal court's remedial scheme if the action is essential to enforce the scheme.").

Moreover, the remedial order's modest effect on the operation of state law regarding term length and residency duration is not some unprecedented intrusion on sovereignty, as the State contends. Rather, courts routinely order equitable relief to remedy violations of federal law even where doing so requires easing state-law requirements. *See, e.g.*, Order, at 3, *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex. Nov. 4, 2011), ECF No. 486 (shortening Texas constitution's residency requirement in connection with ordering special-election schedule); *Brown v. Ky. Legislative Research Comm'n*, 966 F. Supp. 2d 709, 726 (E.D. Ky. 2013) (explaining state constitution's residency requirement for state legislative office did not constrain deadline for drawing reapportionment plan consistent with federal constitutional standards).

The State cannot disregard the first part of the bargain of federalism—adherence to the federal Constitution's prohibition on racial gerrymandering—and then cry foul when its constitutional violation causes disruption to the operation of its state laws regarding term length and residency duration.

B. The District Court's Remedial Power is Not Limited by a State Court's Understanding of the Federal Constitution.

The State also posits that the district court's discretion to fashion relief here must be tempered by the fact that, in a different case involving different plaintiffs, the North Carolina Supreme Court, in a 4-3

split, reached a different conclusion on the merits. *See Dickson v. Rucho*, 766 S.E.2d 238 (N.C. 2014); *vacated*, 135 S. Ct. 1843 (2015) (mem.); *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015), *petition for cert. filed*, 85 U.S.L.W. 3026 (U.S. July 5, 2016) (No. 16-24).

A federal court sitting in equity is, however, not obligated to follow a state court's pronouncements on matters of constitutional law. "The federal district court . . . takes as its authority on federal constitutional issues decisions of the United States Courts of Appeals and the United States Supreme Court, rather than those of the state supreme court." *In re Asbestos Litig.*, 829 F.2d 1233, 1237 (3d Cir. 1987); *see also Grantham v. Avondale Indus., Inc.*, 964 F.2d 471, 473 (5th Cir. 1992) ("It is beyond cavil that we are not bound by a state court's interpretation of federal law . . . .").

Not only was the district court free to reach a different conclusion on the merits, but it certainly owed no deference—based in federalism or any other principle of law—to a state court decision with which it disagreed while fashioning its remedial order. Indeed, it would have been an abuse of discretion for the district court to soften its remedial order in deference to the *Dickson* court's contrary merits conclusion. Having found widespread constitutional violations, the district court had "not merely the power but the *duty* to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana*, 380 U.S. at 154 (emphasis added).

C. Complying with the Remedial Order Will Not Be Time-Consuming or Disruptive to the Legislature's Agenda.

The State contends that shortened legislative terms and special elections will force legislators to focus their time on redistricting rather than other goals. J.S. 26. But the legislature will be required to draw new districts in any event, and its desire to delay that task is hardly one that should override the right of its citizens to not be placed in districts based upon their race.

Moreover, the State exaggerates the scope of the task. *See* J.S. 26 (characterizing task as "guaranteed to be time-consuming"). North Carolina law provides that two weeks is sufficient for the legislature to remedy defects in a redistricting plan. *See* N.C. Gen. Stat. § 120-2.4 (granting legislature two-week period to remedy defects in redistricting plans before courts may impose new maps). And as recently as last year, the legislature accomplished this task in two weeks' time after two of the State's thirteen congressional districts were found to be unconstitutional racial gerrymanders. *See Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016), *prob. juris. noted* 136 S. Ct. 2512 (2016). In that time, the legislature adopted new redistricting criteria,[4] held seven public hearings across

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[4] *See* N.C. General Assembly, *2016 Contingent Congressional Plan Committee Adopted Criteria* (Feb. 18, 2016), http://www.ncleg.net/GIS/Download/ReferenceDocs/2016/CCP16_Adopted_Criteria.pdf.

the state,[5] and enacted new congressional maps with a new primary date.[6] The legislature also made several additional modifications to its election law to comply with the court's remedial order, including modifying filing deadlines, eligibility requirements, and permitting primary winners to be determined by a plurality vote. *See supra* note 6; *see also Stephenson v. Bartlett*, 582 S.E.2d 247, 248-49 (N.C. 2003) (describing twelve-day deadline for legislature to redraw every legislative district).

The State likewise exaggerates the level of disruption the task will pose to the legislature's other activities. As the State concedes, it has already provided the district court with its "optimal county grouping," which will speed the process of ensuring compliance with the state constitution's Whole County provision. Dkt. 136-1 at 5-8. Thus, contrary to the State's characterization, little, if any, disruption to the broader legislative agenda need occur.

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[5] *See* Rep. David Lewis & Sen. Bob Rucho, N.C. General Assembly, Memorandum to Members, Joint Select Committee on Congressional Redistricting (Feb. 12, 2016), http://www.ncleg.net/documentsites/committees/JointSelectCommitteeonCongressionalRedistricting/Joint%20Select%20Committee%20on%20Congressional%20Redistricting%20Public%20Hearing%20Notice.pdf.

[6] *See* H.B. 2, Session Law 2016-2, Extra Session (2016), http://www.ncleg.net/Sessions/2015E1/Bills/House/PDF/H2v5.pdf.

D. The District Court Was Not Required to Delay Remedying Constitutional Violations to Save the State Money.

Finally, the district court was not required to permit the unconstitutional legislative districts to remain in place until the 2018 election on account of the cost to the State of conducting special elections. "[T]he prospect of additional administrative inconvenience has not been thought to justify invasion of fundamental constitutional rights." *Carey v. Population Servs., Int'l*, 431 U.S. 678, 691 (1977). Here, the district court acted within its broad power to remedy the State's far-reaching constitutional violation by ordering special elections in new districts. In doing so, the district court considered the costs involved, but it concluded that the need to quickly remedy the constitutional violations outweighed those costs. *See* J.S. App. 200. This was well within the court's discretion.

IV. The Court Should Ensure this Case is Finally Resolved this Term.

This Court should summarily affirm the district court's remedial order. As explained more fully in the pending motion to affirm the district court's liability decision, this case is even more straightforward than *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016), *prob. juris. noted*, 136 S. Ct. 2512 (2016), and *Bethune-Hill v. Virginia State Board of Elections*, 141 F. Supp. 3d 505 (E.D. Va. 2015), *prob. juris. noted*, 136 S. Ct. 2406 (2016). At issue here was a blatantly unconstitutional racial gerrymander that subordinated traditional redistricting principles to implement explicit racial quotas. The district court's considered effort to

craft an appropriate remedy was not an abuse of discretion.

However, if this Court opts not to summarily affirm, Appellees respectfully request that this Court consolidate this matter with the liability case and expedite merits briefing for argument in April.[7] If the Court issues a decision by June, special elections still could take place in November 2017. If, however, this Court does not decide this case during this Term and does not lift the stay, the State would win by default because the November 2017 special elections ordered by the district court would not be possible.

An even more unfortunate outcome could result if this Court chooses instead to hold this case, and then vacate and remand both this case and the underlying merits appeal for reconsideration in light of the forthcoming decisions in *Harris* and/or *Bethune-Hill*. Such an order would cause intolerable delay. Whichever party did not prevail upon reconsideration in the district court would no doubt return to this Court yet again. Not only would such a delay render special elections impossible in 2017, it would also raise a serious possibility that no remedy would be ordered in time for the regularly scheduled 2018 elections. Thus, an order vacating and remanding for reconsideration in

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[7] An order expediting briefing and argument in this case would not be unprecedented. In *Perry v. Perez*, 132 S. Ct. 843, 843 (2011) (mem.), involving Texas's redistricting plan, the parties completed briefing and argued the case within one month of this Court's order noting probable jurisdiction. *Id.*

light of *Harris* and/or *Bethune-Hill* might very well permit yet another election to proceed using unconstitutional, racially gerrymandered districts.

* * * *

North Carolina's egregious racial gerrymander has continued unabated for far too long. The district court's decision to impose a swift remedy by requiring special elections in 2017 was plainly within its broad equitable discretion. The State's continued effort to delay remedying its racially discriminatory legislative districts must be rejected, and the remedial order affirmed in time to be effective for special elections this fall.

CONCLUSION

The motion to affirm should be granted.

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